87-1491

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOSEPH HOWARD,

Petitioner

v.

FRANK C. CARLUCCI
~~CASPAR W. WEINBERGER~~, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH HOWARD
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Rockville, Maryland 20852
(301) 460-9113

Petitioner Pro Se

TO: The Honorables, The Chief
Justice and Associate Justices
of the Supreme Court of the
United States

Petitioner, Joseph Howard, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, the orders on the petition for rehearing and suggestion for rehearing en banc having been denied and entered on December 10, 1987.

QUESTIONS PRESENTED FOR REVIEW

1. May the appellate court adopt the trial court's decision granting summary judgment, rather than basing its judgment entirely on a review of the trial court record de novo, particularly when there is no evidence supporting, and there is evidence against certain material facts on

which the trial court based its decision?

2. May summary judgment be granted against an employee in favor of the United States Government when the GS-14 employee, who had lost his position in a reduction-in-force, is illegally removed from a program for priority assignment to another GS-14 position in violation of Title 5 U.S. Code, Section 5364, in an action under said statute and the Age Discrimination in Employment Act for reinstatement in said program or other relief, which statutory violation is admitted in writing by one representing the official who ordered the removal, and concurred in writing by the head of the Government personnel activity involved, by an official of the Office of Personnel Management, and by USACARA,

the highest authority in the Army grievance resolution system?

3. Must summary judgment be granted to the employee under the facts in Question #2 above, either for violation of Title 5 U.S. Code Section 5364 and related statutes and regulations, or for violation of the Age Discrimination in Employment Act in discriminating against someone over forty years of age by violating Title 5 U.S. Code Section 5364 and related statutes and regulations?

PARTIES TO THE PROCEEDING

The plaintiff-appellant-Petitioner pro se is Joseph Howard. The defendants-appellees are : Caspar W. Weinberger, Secretary of Defense; John O. Marsh, Jr., Secretary of the Army; John Lehman, Secretary of the Navy; Verne Orr, Secretary of the Air Force, Donald Devine, Director of the Office of Personnel

Management; Major General Robert Arter, Commanding General, Military District of Washington; James F. McDonald, Director, Directorate of Civilian Personnel, Military District of Washington; E.E. Linebaugh, Chief, Fort Myer Civilian Personnel Office, Military District of Washington; F. Newman, Director of Civilian Personnel, Office of the Deputy Chief of Staff for Personnel, U.S. Army; A. Grimmett, Chief, Staffing and Career Management Division, Directorate of Civilian Personnel, Office of the Deputy Chief of Staff for Personnel, U.S. Army; and the United States of America. By amendment to the complaint, the plaintiff deleted the names of the defendants, since they are being sued in their official capacities.

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OPINIONS BELOW

None of the opinions involving the matter herein have been reported or published. The opinion of the United States Court of Appeals for the District of Columbia Circuit, whose judgment is sought to be reviewed, is reprinted in Appendix A. The prior opinion of the United States District Court for the District of Columbia is reprinted in Appendix B. The opinion of the Merit Systems Protection Board, Washington Regional Office, is reprinted in Appendix D. The opinion of the United States Army Civilian Appellate Review Agency (USACARA) is reprinted in Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was filed on October 7, 1987 (Appendix A). A timely

petition for rehearing (Appendix F) and suggestion for rehearing en banc (Appendix G) were denied and filed on December 10, 1987, and this petition was filed within ninety days of that date. The Supreme Court's jurisdiction in invoked under Title 28 United States Code Section 2101(c).

REGULATORY PROVISIONS INVOLVED

Pertinent provisions of Title 29 U.S. Code Sections 631(b) and 663a are found in Appendix N. Pertinent provisions of Title 5 U.S. Code Section 5364 are found in Appendix O. Pertinent regulations are as follows:

A portion of Section 4-2a of Chapter 351 of the Federal Personnel Manual, February 28, 1973, reads as follows:

a. Agency responsibility. An agency must establish competitive areas in which employees compete in reduction

in force.... Ordinarily, employees in one competitive area do not compete with those in another. Whether an employee is retained in reduction in force may very well depend on the number of people he competes with. This fact gives the employee a great interest in the extent of his competitive area and in any change in an established area....

Section 4-2 of Army CPR 300 (351.4), 26 March 1971, reads in part as follows:

a. Agency responsibility. A competitive area once established should not be changed except for a valid reason. Competitive areas should be reviewed periodically to ascertain whether they are currently correct. Such reviews should be made when there has been a significant change in the size or composition of the workforce administered, or when there has been an appreciable change in mission, host and tenant activities, or servicing arrangements.... An established competitive area will not be changed during a reduction in force.

b. Extent of area.

(3) Larger or smaller area. Use of competitive area smaller than required by the standard must be approved by the Civil Service Commission.... Requests for approval.... will include the following information:

(a) Evidence that the proposed area is sufficiently large to prevent the loss of highly efficient employees, to allow true competition to exist, and to protect the retention preference of permanent employees....

Section A-4 of Chapter 335 of the Federal Personnel Manual, May 7, 1981, reads in part as follows:

A-4. Corrective Actions

a. General. (1) 15.1 Alternative Actions. Failure to adhere strictly to laws, OPM regulations and instructions, agency policies and guidelines, and agency promotion plans is to be rectified promptly by the OPM or the agency involved. Action to rectify a violation may involve an employee who was erroneously promoted, an employee or employees who were not promoted or considered because of the violation, or officials who caused or sanctioned the violation. It may also involve correction of program deficiences....

(2) Types of promotion violations.

(a) Procedural. A procedural violation occurs when a promotion action does not conform to the requirements of the applicable promotion plan. It may include, for example:

(i) Failure to consider an employee entitled to consideration; ....

C5, Army Regulation 690-300 (335.1), 15 January 1981, Section 1-5c(6)(b) reads as follows:

(b) Special consideration for repromotion may be accorded for a reasonable period of time (i.e. 2-4 years) to other nontemporary DA or DoD employees who have been changed to lower grades -

1. Without personal cause; and

2. Not at their own request.

Relevant portions of DoD 1400.20-3-M are as follows:

PROGRAM EVALUATION GUIDELINES

PURPOSE

....Activities will take all reasonable and prudent actions to implement a responsive Priority Placement Program consistent with the merit system principles contained in DoD 140020-1-M and the Federal Personnel Manual....

EVALUATION, PHILOSOPHY AND OBJECTIVES

....The purpose of the PPP is to place fully qualified DoD employees into continuing positions. That means: "MAKE PLACEMENTS." In an inspection or evaluation the overriding question is whether the maximum number of placements possible are being made through the PPP, or is there merely compliance with the minimum required by regulation?

STATEMENT OF THE CASE

On September 28, 1981, the petitioner filed a complaint in the U.S. District Court for the District of Columbia against several officials of the U.S. Government in their official capacities under the Age Discrimination in Employment Act, Title 29 of the U.S. Code, Section 621 et. seq., in particular Sections 631(b) and 633a thereof (Appendix N). The complaint alleged that illegal discrimination resulted from a change in competitive areas at a time when petitioner's position had been abolished and reduction in force procedures were anticipated, from a failure to implement properly the Priority Placement Program in contravention of Title 5 U.S. Code, Section 5364 (Appendix O), and from the petitioner's illegal removal from the Priority Placement Program, resulting in a permanent demotion from GS-14 to

GS-11. Jurisdiction of the Court was invoked under Section 633A(c) of Title 28 of the U.S. Code, Sections 1361 and 1346 of Title 28 of the U.S. Code, and Sections 2201 and 2202 of Title 28 of the U.S. Code.

In an Order signed and filed on March 29, 1985, accompanied by a Memorandum (Appendix B), the U.S. District Judge ordered that the petitioner's motion for summary judgment be denied, and that the Government's motion for summary judgment be granted.

The case was appealed to the U.S. Court of Appeals for the District of Columbia Circuit which, in its Judgment (Appendix A), filed October 7, 1987, "Substantially for the reasons stated by the district court, and in the memorandum accompanying this judgment" ordered that "the district court's order and memorandum of March 9, 1985, be affirmed." In orders

filed on December 10, 1987, the appellate court denied petitioner's petition for rehearing and suggestion for rehearing en banc (Appendices F and G).

The litigation herein arose from the following facts. As the result of a manpower survey in February 1978, the petitioner was advised that his GS-14 excepted service position as an Army civilian attorney was recommended for abolishment. He was also advised that he was at the top of a retention register of four attorneys and, consequently, was well protected in the event of a reduction in force. However, although there was little change in the total number of employees, several months later his competitive area was divided into six competitive areas with the petitioner all alone on his retention register. The Army violated Subsection 4-2 of CPR 300 (351.4) by not obtaining prior approval

from the Civil Service Commission, for which approval the Army would have to furnish evidence that the proposed area was "sufficiently large to prevent the loss of highly efficient employees, to allow true competition to exist, and to protect the retention preference of permanent employees."

Since rank in a retention register, for purpose of a reduction in force, was based mostly on veteran status and longevity, with veterans, such as the petitioner, with more longevity outranking those with less, and since longevity is obviously related to age, it was obvious that a great change such as the division of one area into six would have a direct impact on age, and thus be in violation of the Age Discrimination in Employment Act. Geller v. Markham, 635 F.2d 102 (2d Cir. 1980);

William v. General Motors Corp., 656 F.2d 120, 130, n.15 (5th Cir. 1981). Thus, the appellant found himself all alone in a retention register as a result of the change, after having been first in a retention register of four people.

In a letter dated 27 July 1979, the petitioner was advised by his Army personnel office that his GS-14 attorney position (excepted service) had been abolished, and was offered, in lieu of separation, a GS-11 position as Procurement Analyst (competitive service), with no effect on his pay for two years, during which time he would be registered in the Department of Defense Priority Placement Program, in accordance with Title 5 U.S. Code Sec. 5364 (Appendix O). The petitioner accepted.

During the two year period, the petitioner applied for many positions for

which he was qualified, both in the competitive service and excepted service, to no avail. Finally, after about 1½ years had elapsed, the petitioner's personnel office recommended him for a priority placement opportunity, DARCOM Job #8715, Procurement Analyst, GS-14, a competitive service position. Because the hiring agency disagreed with the petitioner's personnel office assessment that he was fully qualified for the position, the matter was sent forward to Defendant Archie Grimmett, the Army Component Coordinator, for resolution. However, instead of deciding the matter, Mr. Grimmett directed that petitioner be removed from the Priority Placement Placement (Appendix H), in violation of Title 5 U.S. Code Sec. 5364. Mr. Grimmett's action illegally aborted the two year period during which the petitioner was entitled to priority consideration for

a GS-14 position.

The petitioner appealed Mr. Grimmett's action to the Merit Systems Protection Board. In one of the exhibits in answer thereto, J. Bryan, on behalf of Mr. Grimmett, conceded that he had erred in removing petitioner from the Priority Placement Program, and directed that he be reregistered in the program (Appendix I). However, the Director of the DoD Centralized Referral Activity advised the Army Civilian Personnel Officer that petitioner's eligibility in the Priority Placement Program could not be reinstated and stated that Army administrative procedures should be employed to correct the administrative error (Appendix J). However, the error has never been corrected and no relief has ever been offered to the petitioner. The Merit Systems Protection Board refused to accept jurisdiction of the matter on the grounds

that the alleged failure of an agency to properly implement its Priority Placement Program is not a matter over which the Board has appellate jurisdiction (D-5). The petitioner filed a petition for review, which was withdrawn when he received a favorable determination from the Office of Personnel Management, (K-2), which was adopted by the Army in a grievance procedure (E-6,7). The Army, however, erected artificial and illegal barriers to keep the favorable determination from going into effect (Appendices L and M).

Mr. Grimmett, apparently unwilling to accept the determination of his subordinate, J. Bryan, in his name, submitted the matter to the Office of Personnel Management. In an answering letter of 5 November 1981 (Appendix K), Mr. Grimmett was advised that the petitioner was entitled to placement consideration on a priority basis for a GS-14 position in

The excepted service, and also for a GS-12 position in the competitive service, since that was the highest grade he had attained in the competitive service. The intent of Title 5 U.S. Code Sec. 5364 (Appendix O) is obviously to place an employee at the same grade and the petitioner was only interested in permanent placement in a GS-14 position. Thus, the two year period during which the petitioner was eligible for priority placement was wasted, since his personnel office was seeking to priority place him in a competitive, rather than excepted, service position, for which he was not eligible at a GS-14 level, according to the Office of Personnel Management determination (Appendix K).

The petitioner had filed a grievance in the matter. The Army Civilian Appellate Review Agency (USACARA), in a decision dated 18 June 1982 (Appendix E),

refused to accept jurisdiction of the matter on the ground that a determination had already been made on the issue in the grievance by a "higher-level authority outside the Department, i.e., the Office of Personnel Management." (E-6). Thus, USACARA accepted the OPM determination and, since it refused to accept jurisdiction, those portions of its decision which involved the merits in the matter are a nullity (See E-5).

However, Mr. Grimmett erected artificial and illegal barriers to the effectuation of the OPM determination. In a memorandum of 16 November 1981, to the petitioner's personnel office (Appendix L), he stated that the petitioner could not be registered in Program R of the Priority Placement Program, and that he had been "informally advised" that the petitioner could be given special

placement efforts for attorney positions only within the Army Research Institute, a small agency with less than 500 employees and no attorney or other excepted service positions. Four days later, in another memorandum (Appendix M), Mr. Grimmett expanded the area to include the Military District of Washington, which has no attorney position as high as GS-14. Both Title 5 U.S. Code Sec. 5364(4) (Appendix O) and implementing regulation 5 C.F.R. 536.206(4) require that priority placement be at least Army-wide, and, if necessary, outside the Army. Mr. Grimmett's manipulation of Title 5 U.S. Code 5364 (Appendix O), by decreasing the area of consideration to one so small that priority placement in a GS-14 position in the excepted service could not possibly be effected, is further evidence of discrimination and retaliation.

Defendant Linebaugh, the chief of the petitioner's personnel office, in a letter of 24 February 1982, to the Commander of the Army Research Institute, stated that, although an administrative error had been made, there were no provisions by which to correct the matter. This statement is erroneous. Provisions by which to correct the error may be found in Chapter 335 of the Federal Personnel Manual (FPM), and in Army Regulation 690-300 (C5, 15 January 1981, a regulation which implements FPM 335. AR 690-300 authorizes special consideration for repromotion for a reasonable time (i.e., 2-4 years) to employees who have been changed to lower grades without personal cause and not at their own request; the employee is entitled to one consideration for each consideration not properly received. The Government has offered no defense to the discrimination and

retaliation on account of age evident in this event.

REASONS FOR GRANTING WRIT

Certiorari should be granted because the U.S. Court of Appeals for the District of Columbia Circuit has reviewed the District Court's summary judgment in a way in conflict with applicable decisions of the Supreme Court and published decisions of said appellate court, and has so far sanctioned the use of erroneous material facts by the District Court as a basis for its summary judgment, as to call for an exercise of the Supreme Court's power of supervision.

ADOPTION OF TRIAL COURT DECISION REPLETE WITH ERRORS OF MATERIAL FACT

In its judgment, the appellate court ordered and adjudged that the district court's order and memorandum of March 29, 1985, be affirmed "Substantially for the

reasons stated by the district court, and in the memorandum accompanying this judgment". Although in its memorandum the appellate court states that it bases its conclusions on a view of the trial court record, the brevity of its memorandum and the nature of statements therein, without a discussion of the complex factual and legal problems in this case, as well as the quoted statement from its judgment, suggest that more reliance was placed on the District court order and memorandum than on a review of the record. This would be in conflict with the following Supreme Court and D.C. Circuit Court decisions: Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1572, U.S.C.A., D.C. Cir., 241 U.S. App. D.C. 246 (1984), certiorari granted in part 105 S. Ct. 2672, 471 U.S. 1134, 86 L. Ed 2d 691, vacated and remanded

Anderson v. Liberty Lobby, Inc., 106 S Ct. 2505, 91 L. Ed. 2d 202 (1986); and E.P. Hinkel and Co., Inc. v. Manhattan Co., 506 F.2d 202, 204 (D.C. Cir. 1974).

The petitioner maintains that, in the review of the granting of the Government's motion for summary judgment, he is entitled to a hearing de novo. The appellate court should have put itself in the shoes of the district court, without consideration of the district court's memorandum.

Some of the material errors of fact in the District Court memorandum are as follows. With respect to statements from B-7 on, the petitioner has set out the facts necessary to establish age discrimination in the documents filed in the District Court. These arguments were repeated in the appellate brief. With respect to note 8 on page B-12,

pretext is found, as stated herein, in the facts that, although there was little change in total employment in the competitive area, a great change, from one to six competitive areas took place without obtaining the approval of OPM, required by OPM regulation, to make sure that a person's retention position was not affected. The petitioner became vulnerable because he went from the top of a retention register of four people to one in which he was all alone, and, consequently, lost his grade in a reduction in force.

The statement, at the bottom of page B-14, that the changes, as well as the processing through reduction in force procedures after the job was abolished "were undertaken in complete compliance with applicable civil service and departmental regulations" is absolutely erroneous as indicated in the statement

of the case herein. The gist of the petitioner's action is that the procedures were fundamentally and materially flawed because of numerous violations of statutes and regulations, and even by conscious manipulation of statutes and regulations to avoid their implementation (Appendices L and M).

With respect to the Court's statement, at the bottom of page B-17, that the petitioner was considered for eight GS-14 positions, all were for competitive service positions for which it was subsequently determined (Appendix K) that the petitioner was not eligible. Thus, his entire two year period of repromotion eligibility was wasted because the personnel department did not know what it was doing. Since he was only eligible for excepted service positions at the GS-14 level (K-2,3), Title 5 U.S. Code Sec. 5364(3) and (4) required that such

a position be sought under the Priority Placement Program. Any regulation (see B-20) in conflict with this statutory requirement is, of course, invalid.

The amount in issue is far more than the amount in note 13 on page B-20. The statements in the second paragraph of page B-22 are erroneous. The plaintiff was never reinstated in the Priority Placement Program; nor was he given any other relief.

On page B-24, the court admits that the petitioner was ineligible under the Priority Placement Program, for the positions to which the personnel department referred him, because they were competitive, rather than excepted service, positions. And yet, the Court concluded that "The uncontradicted facts establish that plaintiff received all

the consideration to which he was entitled, and more". Since the petitioner in effect received no consideration whatsoever, this is obviously an erroneous statement of material fact.

With respect to the statements on page B-25, this case does not consist of occasional error. The whole procedure is replete with error and violations of law, some of which were intentional (See Appendices L and M), to prevent the petitioner from attaining his due, priority consideration for GS-14 positions in the excepted service. Discrimination, therefore, resulted from manipulation.

AGE DISCRIMINATION RESULTING FROM VIOLATIONS OF STATUTES AND REGULATIONS

The violations of statutes and regulations protecting the interests of the petitioner to this detriment, as disclosed herein, constitute actionable discrimination. Any other conclusion would

be incompatible with the nature of a democracy. Illegal conduct cannot be accepted as the norm, and compensatory relief should be forthcoming. It is the function of courts to protect citizens from illegal and arbitrary acts of the Executive Branch. Courts have held that the violation and manipulation of statutes and regulations to the detriment of employees constitutes illegal discrimination. McDonnel Douglas Corp. v. Green, 411 U.S. 792, 804, 93 S. Ct. 1817, 1825, 36 L. Ed. 2d 668, 679 (1973); Smith v. Secretary of Navy, 659 F.2d 1113, 1121, D.C. Cir. (1981).

In Connecticut v. Teal, 457 U.S. 440, 102 S. Ct. 2525, 73 L. Ed 2d 130 (1982), the Supreme Court held that Title VII strove to achieve equality of opportunity by rooting out "artificial, arbitrary, and unnecessary" employer-created barriers to professional development that had a discriminatory impact on individuals, and

that the statute spoke, not in terms of jobs and promotions, but in terms of "limitations and classifications that would deprive any individual of employment opportunities." If such barriers, in addition, violate statutes and regulations, as in the case at bar, a stronger case for illegal discrimination is established.

The petitioner has established discrimination against him on account of age in each of three successive events, resulting in his permanent demotion from GS-14 to GS-11, under both the disparate impact and disparate treatment theories. In each event, statutes or regulations which would have protected the petitioner were violated.

In the first event, the division of the competitive area into six areas, at a time when there was no great increase in personnel, violated Subsection 4-2 of

CPR 300 (351.4), by not obtaining prior approval from the Civil Service Commission, which approval would have required a showing that the proposed area was sufficiently large to protect the retention preference of permanent employees. Before the illegal change, the petitioner was at the top of a retention register of four individuals. As a result of the change, he was all alone in a retention register and very vulnerable in the event of a reduction in force, which eventually happened and resulted in his permanent demotion to GS-11.

By not seeking to place the petitioner in an excepted service priority placement GS-14 position, and by finally removing him altogether from the priority placement program, Title 5 U.S. Code Sec. 5364 (Appendix O), was violated; thus, denying him opportunities to retain his GS-14 grade.

The OPM determination gave the petitioner the right which he sought, priority consideration for placement in GS-14 openings in the excepted service. USACARA, the final grievance authority in the Army, adopted the OPM determination as one from higher authority, and, therefore, refused to accept jurisdiction. However, Defendant Grimmett arbitrarily reduced the area of consideration to one in which there were no GS-14 excepted service positions, again in violation of Title 5 U.S. Code, Sec. 5364(3) and (4) (Appendix O).

Nor has the Army taken the corrective action required under these circumstances, despite the existence of regulations to implement the correction.

CONCLUSION

Based on the foregoing, the petitioner urges the Supreme Court to grant his petition for writ of certiorari, because the Circuit Court adopted and sanctioned the findings of the District Court in granting summary judgment against the petitioner in a decision replete with errors of material fact (See F.C.R.P. 56(c)), and because the petitioner was subjected to age discrimination by being deprived of grade and pay benefits by violations of statutes and regulations.

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED - SEE LOCAL RULE 8 (f)

FILED
October 7, 1987
George A. Fisher
Clerk, U.S. Court of Appeals
For the District of Columbia Circuit

JOSEPH HOWARD, Appellant	)	Sept. Term 1987
vs.	)	No. 85-6096
HONORABLE CASPAR W. WEINBERGER Secretary of Defense, et al.	)	C.A. 81-02398

BEFORE: Edwards, Ruth B. Ginsburg and Buckley, Circuit Judges

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

J U D G M E N T

This case was considered on the record on appeal from the United States District Court for the District of Columbia and on the briefs filed by the parties. The Court has determined that

the issues presented occasion no need for a published opinion. See D.C. Cir. Rule 14(c). Substantially for the reasons stated by the district court, and in the memorandum accompaning this judgment, it is

ORDERED AND ADJUDGED by the court that the district court's order and memorandum of March 29, 1985 be affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely request for rehearing. See D.C. Cir. Rule 15.

Per Curiam

Bills of cost must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

M E M O R A N D U M

Pro se appellant, Joseph Howard, filed a complaint in district court on

September 28, 1981 against several officials of the United States Government in their official capacities under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 621, 633a (1976). The complaint alleged that as a result of the 1979 abolishment of his position as a GS-14 attorney advisor with the Army Research Institute for Behavioral and Social Sciences ("ARI"), and the Army's subsequent refusals to appoint him to GS-14 competitive or excepted service positions, the officials discriminated against him in violation of the ADEA. Howard later asserted in motions to amend and supplement pleadings that the procedures employed in abolishing his position and in promulgating new personnel regulations which adversely affected him violated his rights under the Fifth Amendment Due Process Clause and the Administrative Procedure Act ("APA"), 5 U.S.C. 5364, 7512(3)(4). Howard sought declaratory and injunctive

See Abraham v. Graphic Arts International Union, 660 F.2d 811 (D.C. Cir. 1981). Summary judgment is appropriate only on demonstration "that there is no genuine issue as to any material fact and that the moving part is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Our review of the record before the district court when it granted summary judgment satisfies us that nothing therein sufficed to create a genuine issue of material fact with respect to Howard's claim of age discrimination. See Anderson v. Liberty Lobby, Inc.,106 S. Ct. 2505, 2512 (1986).

Howard portrays himself as a loyal employee frustrated by the ponderous operation of a large bureaucracy. However that may be, the record indicates no evidence that age was a "determining factor" in the employment decisions about which

Howard complains. See Coburn v. Pan American World Airways, Inc., 711 F.2d 339, 345 (D.C. Cir.), cert. denied, 464 U.S. 994 (1983). As this court noted in Coburn, "[t]he ADEA protects employees only against unlawful discrimination." Id. Therefore, we affirm the district court's disposition of Howard's case. [2]

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2. We affirm the district court's decision denying Howard's motion to amend his complaint to allege additional facts of age discrimination and retaliation. A review of the motion to amend the complaint indicates no additional facts suggesting any reasonable inference of unlawful discrimination under the ADEA. To the extent that Howard's amendment seek redress for age discrimination and retaliation outside of the ADEA, the amendments are precluded by the ADEA. See Paterson v. Weinberger, 644 F.2d 521, 524-25 (5th Cir. 1981) (ADEA Constitutes exclusive remedy for age discrimination in federal employment).

We also affirm the district court's ruling that judicial review under the APA is foreclosed under the Civil Service Reform Act, which provides the appropriate administrative remedies. See Bush v. Lucas, 462 U.S. 367 (1983).

The district court's dismissal of Howard's Fifth Amendment claim is also affirmed, though on different grounds. See

United States International Trade Commission v. Tenneco West, 822 F.2d 73, 80 (D.C. Cir. 1987). Prior to the government's answer and pursuant to Fed. R. Civ. P. 15(a), Howard amended his complaint in order to delete all names of all defendants "[s]ince the defendants are being sued in their official capacities." R. 2. Howard's motion to amend his complaint, however, while alleging a violation of rights under the Due Process Clause of the Fifth Amendment, does not name any defendants in their individual capacities. See Bivens v. Six Unknown Named Narcotics Agents, 403 U.S. 388 (1971). Consequently, the dismissal of Howard's Fifth Amendment claim must be affirmed.

APPENDIX B

FILED
March 29, 1985
James F. Davey, Clerk
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH HOWARD, Plaintiff	)	Civil Action No. 81-2398
vs.	)	
CASPAR W. WEINBERGER, Defendant.	)	

ORDER

For the reasons stated in the Memorandum issued this date, it is this 29th day of March, 1985

ORDERED that plaintiff's motion to amend his complaint be and it hereby is denied; and it is further

ORDERED that plaintiff's motion for summary judgement be and it hereby is denied; and it is further

ORDERED that defendant's motion

for summary judgment be and it is hereby granted; and it is further

ORDERED that this action be and it is hereby dismissed.

/s/
HAROLD H. GREENE
United States District Judge

APPENDIX B

FILED
March 29, 1985
James F. Davey
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH HOWARD, Plaintiff	)	
	)	Civil Action No.
vs.	)	81-2398
CASPAR W. WEINBERGER, Defendant.	)	

MEMORANDUM

In this action plaintiff, a 62-year old [1/] civilian attorney employed by the United States Army, has asserted a variety of statutory and constitutional claims against the Army stemming from the 1979 abolishment of his position as a GS-14 attorney advisor with the Army Research Institute for Behavioral and Social

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1/ Plaintiff was 62 years old at the time he commenced this action. At the time the relevant events described herein occurred, plaintiff was in his late fifties.

Sciences (ARI). Plaintiff claims that this abolishment and the Army's subsequent refusals to appoint him to GS-14 competitive service positions discriminated against him in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621, 633a. He also asserts that the procedures employed in abolishing his position and in promulgating new personnel regulations adversely affecting him, violated his rights under the Fifth Amendment's Due Process Clause and the Administrative Procedure Act (APA), 5 U.S.C. 5364, 7512(3) (4). Plaintiff seeks declaratory and injunctive relief and damages, and he has moved for summary judgment.

The government has moved to dismiss, or in the alternative for summary judgment, on the grounds that

the ADEA precludes plaintiff from asserting claims under the APA and the Fifth Amendment, that the ADEA claims are time-barred, and that in any event these claims are without merit. For the reasons stated below, the government's motion will be granted and the action will be dismissed.

I

The government has opposed plaintiff's motion to amend his complaint to add claims under the Fifth Amendment and the APA on the basis that the claims asserted in the proposed amendments are precluded as a matter of law and that the amendments are therefore futile. The point is well taken.

To the extent that the proposed amendments seek redress for alleged

age discrimination and retaliation, they are precluded by the ADEA, which Congress has established as the exclusive remedy for age descrimination in federal employment. Purtill v. Harris, 658 F.2d 134 (3d Cir. 1981); Paterson v. Weinberger, 644 F.2d 521, 524-25 (5th Cir. 1981); cf. Brown v. General Services Administration, 425 U.S. 820, 825 (1976). On the other hand, to the extent that the amendments do not sound in discrimination, judicial review under the APS is foreclosed under the Civil Service Reform Act, which provides the appropriate administrative remedies. 2/ See Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983); and see Bush v. Lucas, 103 S. Ct. 2404 (1983).

2/ In fact, plaintiff has availed himself of these remedies. See note 14, infra.

Under Rule 15(a), Fed. R. Civ. P., when a party seeks to amend his complaint, leave to do so is to be "freely given when justice so requires." Id. But where the proposed amendments could not withstand a motion to dismiss, and would result only in delaying the resolution of the litigation with resulting prejudice to both parties, leave to amend may properly be denied. See Massarsky v. General Motors Corp., 705 F.2d 111, 125 (3d Cir. 1983). Since, for the reasons cited above, plaintiff's Fifth Amendment and APA claims would be subject to dismissal, nothing would be gained by permitting him to amend the complaint to include these claims. Accordingly, the Court will deny the motion to amend.

II

Plaintiff asserts essentially two distinct claims under the ADEA. First,

he alleges discrimination stemming from a reorganization and diminution of competitive areas in 1978, and the abolishment of his position in 1979, resulting in his subjection to a reduction in force (RIF) proceeding and a transfer to a GS-11 competitive service Procurement Analyst position. Second, he alleges discrimination in connection with his subsequent treatment in the so-called Priority Placement Program, the Army's denial to him of one position for which he was initially found qualified, and the ultimate termination of his Priority Placement Program status.

To prevail on either claim, plaintiff must initially establish a prima facie case of discrimination. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The precise

elements of a prima facie case will necessarily vary somewhat depending upon the particular facts involved (see McDonnell-Douglas, supra, 411 U.S. at 802 n.13), and upon the question whether a plaintiff is proceeding under a disparate impact or a disparate treatment theory. Talev v. Reinhardt, 662 F.2d 888, 892 (D.C. Cir. 1981). 3/

On what may be called his RIF claim,4/ plaintiff appears to be

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3/ In a disparate impact theory case, a plaintiff alleges that a facially neutral employment standard in fact operates to discriminate against members of the protected class. By contrast, in a disparate treatment case, a plaintiff alleges that he was singled out for discriminatory treatment because of his membership in the protected class. Compare Albemarle Paper Company v. Moody, 422 U.S. 405 (1975), with McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

4/ With regard to the reduction in force itself, which affected only him, plaintiff appears to be proceeding solely on a disparate treatment theory.

proceeding under both theories. His complaint seems to allege both that the change in competitive areas had a disparate impact on persons protected under the ADEA, including himself, and that the change in competitive areas was motivated by discriminatory intent and therefore constituted disparate treatment. A review of the facts, however, indicates that plaintiff has failed to establish under either theory a prima facie case sufficiently strong to withstand a motion for summary judgment. 5/

5/ In considering a motion for summary judgment in an employment discrimination case, courts are obligated to determine first, whether there are no genuine issues of material fact, and second, whether on the undisputed facts the plaintiff has established the requisite elements of his case under traditional discrimination analysis principles. See Talev v. Reinhardt, supra; Abraham v. Graphic Arts International Union, 660 F.2d 811, 814-15 (D.C. Cir. 1981).

To establish a *prima facie* disparate impact claim regarding the change in competitive areas, plaintiff must establish (1) that he is a member of the class protected by the ADEA, and (2) that the change in competitive areas disproportionately affected members of the class. *Talev v. Reinhardt*, *supra*, 662 F.2d 892. [6/] Plaintiff, who was in his late fifties at the time of the change in competitive areas, clearly is protected by the ADEA from discharge based on his age. [7/]

6/ Although *Talev* was a race discrimination case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, courts have frequently analogized to Title VII in analyzing claims brought under the ADEA. See, *e.g.*, *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339 (D.C. Cir. 1983).

7/ Since plaintiff was between forty and seventy years of age, he clearly was a member of the class protected under the ADEA. See *Coburn v. Pan American World Airways, Inc.*, *supra*, 711 F.2d at 342 (D.C. Cir. 1983).

However, there is no evidence whatever that the change in competitive areas disproportionately affected older civilian Army employees. That being so, plaintiff has failed to establish a prima facie case that the reorganization of competitive areas was discriminatory, and his claim under this theory must be rejected. 8/

The disparate treatment claim is similarly flawed. To survive a motion for summary judgment, plaintiff must

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8/ As discussed infra, plaintiff has also failed to adduce any evidence that the Army's profferred basis for the reorganization of competitive areas -- administrative efficiency -- was pretextual; accordingly, even if he had shown disparate impact, his claim would be subject to dismissal on the alternative ground that he had failed to come forward with rebuttal evidence that the profferred non-discriminatory justification for the change in competitive areas advanced by the Army was pretextual. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Talev v. Reinhardt, supra, 662 F.2d at 892.

establish a prima facie case by adducing facts showing: (1) that he is a member of the class protected by the ADEA; (2) that he was performing his job satisfactorily; (3) that he was discharged under circumstances giving rise to an inference of unlawful discrimination; and (4) that he was disadvantaged in favor of a younger person. See Coburn v. Pan American World Airways, Inc., 711 F.2d 339, 342 (D.C. Cir. 1983). Plaintiff clearly satisfies the first two elements: he was a member of the protected class [9/] and the government does not dispute his statement that he was performing his job satisfactorily. However, plaintiff has utterly failed to come forward with evidence supporting the third and fourth elements.

9/ See supra, note 7.

None of the facts surrounding the change in competitive areas, the abolishment of plaintiff's position, or plaintiff's subjection to reduction in force proceedings supports an inference of discrimination. The record shows, and plaintiff does not dispute, that both the change in competitive areas and the abolishment of his position were undertaken based upon recommendations of an Army manpower survey team. Indeed, plaintiff does not dispute the administrative justification for the abolishment of his position in particular. Moreover, these changes, as well as plaintiff's processing through reduction in force procedures after his job was abolished, were undertaken in complete compliance with applicable civil service and departmental regulations. And, of

course, since plaintiff's position, which was abolished, was unique, he could not show that he was disadvantaged in favor of a younger person.

In short, plaintiff has failed to come forward with any evidence indicating that the reorganization of competitive areas, abolishment of his job, and reduction in force were undertaken in an irregular manner or for discriminatory reasons. Whether this is viewed as a failure by plaintiff to satisfy his initial burden of demonstrating circumstances giving rise to an inference of unlawful discrimination (see McDonnell-Douglas, supra), or alternatively as a failure to adduce evidence rebutting ad pretextual the Army's articulated legitimate non-discriminatory business reasons for

reorganizing the competitive areas and abolishing his position (see Texas Department of Community Affairs v. Burdine, supra) the conclusion must be that plaintiff has failed to produce sufficient evidence of age discrimination under any theory to withstand a motion for summary judgment. Accordingly, his claim with respect to the reduction in force and the events preceding it must be dismissed.

III

As noted previously, plaintiff has also asserted a claim concerning alleged discrimination in the administration of the Army's Priority Placement Program. A review of the relevant facts indicates, however, that this claim, too, lacks merit.

After being processed through the reduction in force, plaintiff was offered

and he accepted a position as a GS-11 competitive service Procurement Analyst, in which he was permitted to retain his previous GS-14 excepted service pay and grade benefits for all purposes except for reductions in force. In accepting this position, plaintiff requested that he also be placed in the Defense Department's Priority Placement Program. The Army granted that request, and it registered plaintiff in the Program's "Program R" for available GS-14 contract and procurement analyst positions.

During the period from August 1979 to June 1981, plaintiff was considered for eight permanent GS-14 contract and procurement analyst positions in the Washington, D.C. area, but he was not

appointed to any of them. 10/ It is his rejection for one of these positions -- a GS-14 procurement analyst position in DARCOM -- and his subsequent termination from the Priority Placement Program, that form the gravamen of his second ADEA claim. The sequence of events surrounding this controversy was as follows.

When plaintiff applied for the DARCOM position, a dispute arose between the personnel office and the DARCOM office as to his qualifications. The former recommended him as qualified; the latter disagreed; and, particularly after plaintiff supplemented his

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10/ One position was cancelled, and plaintiff was found unqualified at the initial screening level for six of the remaining seven positions due to his specialized and narrow experience.

application with a statement concerning his qualifications, the personnel office again found him to be qualified. Eventually, in accordance with the Priority Placement Program procedures, the dispute was forwarded to the Program Coordinator for resolution.

That official concluded that plaintiff was not and had never been eligible for registration in Program R, and he accordingly ordered plaintiff removed from the Program in June 1981. The Coordinator further found that plaintiff was ineligible for Priority Program Placement to a GS-14 competitive position because of his grade level, 11/ and he

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11/ The basis for the Coordinator's decision was Chapter 335 of the Federal Personnel Manual, which prohibited the non-competitive promotion of any employee to a grade level beyond that which he had attained in the competitive service. Plaintiff's highest competitive service level was a GS-12, and he was therefore deemed ineligible for Priority Program placement to a GS-14 competitive position.

was also ineligible for registration in Program R for his retained GS-14 excepted service grade because a Department of Defense regulation, DOD 1400, 20-I-M, excluded attorney positions from such registration. 12/

Plaintiff, concerned about the loss of pay that would result from his termination from the Priority Placement Program and his reinstatement as a GS-11 competitive service employee, 13/ thereupon commenced a series of administrative appeals, all of which ultimately

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12/ See Deft. Ex. 18 (Statement of Janet Manov, Personnel Staffing Specialist),

13/ Id. Apparently, plaintiff stood to lose about $1500 annually.

proved unsuccessful. 14/

In the wake of plaintiff's appeals, and after consulting with personnel experts at the Office of Personnel Management, 15/ the Program Coordinator reconsidered his previous determination.

14/ Plaintiff initiated an age discrimination complaint by filing a June 15, 1981 notice of intent to file a civil action with the Equal Employment Opportunity Commission (EEOC). The EEOC referred the matter to the Army's EEO office, which ultimately concluded that his allegations lacked merit. See Deft. Ex. 43 (Report of Arthur Wood, EEO Specialist). Plaintiff's appeal to the Merit Systems Protection Board (MSPB), initiated on September 10, 1981, similarly proved unsuccessful. Defendant does not dispute that plaintiff's June 15 filing with the EEOC of his notice of intent to sue occurred within 180 days of the alleged discriminatory act and accordingly satisfied the notice requirements of the ADEA, 29 U.S.C. 633a(d), and thereby satisfied the only applicable administrative remedy exhaustion requirement. See Kennedy v. Whitehurst, 690 F.2d 951 (D.C. Cir. 1982).

15/ See Deft. Ex. 34-37.

He now concluded that his initial determination regarding plaintiff's eligibility for participation in the Priority Placement Program was in error, finding that plaintiff was not ineligible for the Program. On this new basis, the Coordinator concluded that plaintiff was indeed eligible for consideration, but even so his eligibility extended only to non-attorney GS-14 excepted service positions for which he was qualified.

Consistent with this determination, plaintiff was reinstated in the Priority Placement Program for an additional period to compensate for that in which he had erroneously been excluded. However, an appropriate GS-14 excepted service position apparently failed to become available during this time, and plaintiff was ultimately terminated from the Program without having obtained a new GS-14 position.

This sequence of events does not establish a case of discrimination. The distinction between excepted service and competitive service positions is a long-established principle of federal personnel policy. 16/ The Army's refusal to violate that policy by placing plaintiff in a GS-14 competitive service position for which he was unqualified under civil service regulation (see note 11, supra) cannot reasonably be characterized as a discriminatory rejection. Regardless of whether the case is viewed as one in which plaintiff has failed to carry his initial burden of showing that he was qualified for the position which he was denied (see McDonnell-Douglas Corp. v. Green, supra, 411 U.S. 792, 802 (1971)), or as one in

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16/ Deft. Ex. 36 (Letter from Michael Horvitz, Office of Personnel Management); see, e.g., Federal Personnel Manual Chapter 351 7-8(e); 5 C.F.R. 351.403(b).

which he has failed to rebut the Army's profferred nondiscriminatory basis for denying him the position, the claim that he was discriminated against on the basis of age is simply untenable.

Similarly untenable is plaintiff's claim that the Priority Placement Program was administered in a discriminatory manner. The uncontradicted affidavits establish that the Army honored plaintiff's request for placement in the Program; that it repeatedly informed him of the availability of GS-14 positions for which he might be qualified; and that he received consideration for all of these competitive service positions -- all of this even though, as the Army later realized, plaintiff was ineligible to compete for any of them. The uncontradicted facts establish that plaintiff received all the consideration to which he was entitled, and more.

Accordingly, the Court concludes that plaintiff's Priority Placement Program age discrimination claim must also be dismissed.

IV

As the Court of Appeals has noted, the ADEA "protects employees only against unlawful age discrimination." Coburn, supra, 711 F.2d at 345. It is not a remedy for the adverse effects on an employee of appropriate federal personnel decisions. Nor is it a remedy for the frustration caused either by such decisions or by the confusion and occasional error, that unrelated to discrimination, that will inevitably occur in large bureaucracies. Where, as here, plaintiff has failed to establish any basis for inferring unlawful age discrimination, his ADEA suit cannot be maintained. Accordingly, the Court will

grant the government's motion for summary judgment, and the action will be dismissed.

Dated: March 29, 1985

/s/
HAROLD H. GREENE
United States District Judge

APPENDIX C

FILED
August 23, 1985
James F. Davey
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH HOWARD, Plaintiff, vs. CASPAR W. WEINBERGER, et al., Defendants.	Civil Action No. 81-2398

ORDER

Upon consideration of plaintiff's motion to alter and amend the Court's March 29, 1985 Order dismissing this action, and it appearing that the motion lacks merit, it is by the Court this 28th day of August, 1985

ORDERED that the motion be and it is hereby denied.

/s/
HAROLD H. GREENE
United States District Judge

APPENDIX D

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

JOSEPH HOWARD	)	CASE NO: DC03518110846
vs.	)	
DEPARTMENT OF THE ARMY	)	DATED: December 28, 1981

INTRODUCTION

On September 10, 1981, appellant filed an appeal with the Merit Systems Protection Board from the action of the Department of the Army, Fort Meyer, Virginia, resulting in a change in grade from GS-14 to GS-11 through the use of reduction-in-force procedures. The reduction in force was effective September 30, 1979.

JURISDICTION

Title 5, United States Code, Section 3502 requires the Office of Personnel Management (hereinafter OPM) to prescribe

regulations for the release of competing employees in a reduction-in-force (hereinafter RIF) which gives consideration to the competing employee's tenure, length of service, military preference, and efficiency or performance ratings. OPM's regulations require that an agency follow certain procedures in conducting a RIF. 5 C.F.R. 351.201 et seq. The regulations also provide that an employee who has been affected by a RIF has a right of appeal to the Board. 5 U.S.C. 7701; 5 C.F.R. 351.901.

Appellant is an employee of the Executive Branch of the Federal government who was released from his competitive level by a RIF. Accordingly, I find the appeal is within the appellate jurisdiction of the Board.

TIMELINESS

Under 5 C.F.R. 1201.22(b), a petition for appeal must be filed any time during

the period beginning with the day after the effective date of the action being appealed until not later than 20 days after the effective date. As appellant's petition was received by this office more than 20 days after the effective date of the action, it is necessary to determine if there is a sufficient cause to waive the 20-day time limit. See 5 C.F.R. 1201.12.

In his petition for appeal, appellant stated that he did not appeal the RIF at the time it occurred because he believed the agency would return him to a GS-14 position under their Priority Placement Program. However, appellant was clearly informed of his right to appeal the RIF to the Board. The July 27, 1979 reduction-in-force notice informed him that he had a right to appeal to the Board. In addition, this notice was amended on August 29, 1979. This amendment also

informed him of his right to appeal to the Board. Appellant was clearly aware of his right of appeal. By electing not to appeal the RIF at the time it occurred, appellant has knowingly and voluntarily waived the right to appeal the RIF. I find that he has failed to show cause for a waiver of the regulatory time limit.

Appellant alleges that he is actually appealing from the agency decision to lower his grade and pay effective September 30, 1981. He states that this action is within the jurisdiction of the Board. Under the provision of 5 U.S.C. 5366, the rights of appeal of an employee affected by grade and pay retention are explained. An employee so affected has a right to appeal a RIF under the appropriate regulations. This means that the RIF must be appealed within 20 days of the effective date of the action to

the Board. Under these provisions, appellant is not granted any other right of appeal within the appellate jurisdiction of the Board. In addition, under the provisions of 5 C.F.R. 1201.3, which explains the types of actions over which the Board has appellate jurisdiction, appellant has no additional right of appeal within the appellate jurisdiction of the Board beyond his right to have appealed the RIF in a timely manner.

Appellant also contends that since the failure by the agency to properly implement the Priority Placement Program resulted in the reduction in grade and pay, the Board should exercise jurisdiction over this matter. As noted above, 5 C.F.R. 1201.3 explains those actions over which the Board has appellate jurisdiction. The agency's alleged failure to properly implement its Priority Placement Program is not a matter over which the Board has appellate jurisdiction.

Appellant also contends that he was discriminated against by the agency and that improper personnel practices were a factor in the agency taking this action. Although the Board may consider such matters, it can only hear them when they are raised in conjunction with a matter which falls within the appellate jurisdiction of the Board. (See 5 C.F.R. 1201.56(b), 5 C.F.R. 1201.151.) Since the appellant has failed to raise any matter the Board will hear, I find that I am unable to consider these allegations.

Appellant also alleged that the agency granted him an improper within-grade salary increase. He contends that the increase should have been on the basis of a GS-14 salary and that the agency granted him the within-grade increase on the basis of a GS-11 salary. By letter dated October 26, 1981, the agency admitted their mistake and

forwarded a corrected copy of a payroll form showing that the correction had been made. Appellant was provided with an opportunity to show why this matter would still be within the appellate jurisdiction of the Board in light of this agency action. To date, no response was received. I therefore conclude that the agency action renders this appeal of an improper within-grade salary increase moot.

DECISION

The appeal is hereby dismissed.

This is an initial decision. It will become a final decision of the Merit Systems Protection Board on February 1, 1982 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of OPM, and the Special Counsel

may file a petition for review. The Director may request review only if he/she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office of Personnel Management. The Board may grant a petition for review, after providing an opportunity for response by other parties, when it is established that: (1) New and material evidence is available that, despite due diligence, was not available when the record was closed, or (2) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

All petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and

with specific reference to the record. The petition for review must be filed with the Secretary of the Merit Systems Protection Board, Washington, D.C. 20419, no later than February 1, 1982. Three copies of the petition must be filed with the Secretary.

The appellant has the right to petition the Equal Employment Opportunity Commission to consider the Board's final decision on the issue of discrimination. The appellant may choose, instead, to exercise the right to file a civil action under Federal anti-discrimination laws in an appropriate U.S. District Court. Appellants who choose to file an action in a District Court also have the right to request the court to appoint a lawyer to represent them, and to request that prepayment of fees, costs, or security be waived. Either petition to the EEOC or a civil action in a U.S. District

Court must be filed no later than thirty (30) days after appellant's receipt of the Board's final decision.

For the Board:

/s/
LEONARD J. LEVY
Presiding Official

APPENDIX E

USACARA-GC 18 June 1982

REPORT OF FINDINGS AND DECISION
IN THE GRIEVANCE OF
MR. JOSEPH F. HOWARD
US ARMY INSTITUTE FOR THE
BEHAVORIAL AND SOCIAL SCIENCES
ALEXANDRIA, VIRGINIA

I. INTRODUCTION

A. On 13 October 1981, Mr. Joseph F. Howard, a Procurement Analyst, GS-1102-11, employed by the US Army Institute for the Behavorial and Social Sciences, Alexandria, Virginia, filed a formal grievance; Mr. Howard amended his grievance by letters dated 18 December 1981 and 8 January 1982. Prior to the 30 September 1979 "Conversion to Reinstatement - Career" by which he was placed in his current position (which action resulted from Reduction-in-Force), Mr. Howard was employed as an Attorney Advisor (Contract), GS-905-14 (an excepted service position), within the

same organization. Mr. Howard was entitled to grade retention benefits through 29 September 1981 and was informed that, during this same period, he was entitled to register in Program R of DoD Priority Placement Program (PPP). In his grievance, Mr. Howard alleges that he has not been provided proper placement in a GS-14 position under the PPP and specifically cites the allegedly improper denial, in June 1981, of placement in a Procurement Analyst, GS-1102-14, position at Headquarters, US Army Material Development and Readiness Command (DARCOM). As personal relief, Mr. Howard requests placement in the Procurement Analyst, GS-1102-14, position at DARCOM or some other position at the GS-14 level.

B. The file does not reflect that Mr. Howard is represented in his grievance.

C. The case, forwarded to Greater Capital Region, USACARA-Columbia, by letter of 6 April 1982 (Exhibit A), was received on 8 April 1982. On-site inquiry was unnecessary.

II. BASIS FOR REJECTION OF CASE

A. As to Mr. Howard's claim to entitlement to placement in GS-13 or GS-14 level positions under the PPP (including the Procurement Analyst, GS-1102-14, position at DARCOM), the record reflects that the Office of Personnel Management (OPM) has determinted that because Mr. Howard had attained a grade no higher than GS-12 in the competitive service, he was not eligible for noncompetitive promotion to any positions above the GS-12 level in the competitive service (Exhibit H.). It is noted that, while Mr. Howard actually was - for a time - registered in the PPP for priority

consideration against contract and procurement positions, GS-1102-14, and received consideration for the Procurement Analyst, GS-1102-14, position at DARCOM as a result thereof, the OPM determination indicates that Mr. Howard should not have been so registered and considered in the first place.

B. Mr. Howard disputes the validity of the determination regarding his eligibility for re-promotion to a competitive service position above the GS-12 level, contending that it is inconsistent with provisions of FPM 335, 5 U.S.C. 5364, and DoD 1400.20-1-M, "...the due process clause of the U.S. Constitution, civil service laws, the Age Discrimination in Employment Act, and other legislation...". As of the time he filed the latest

amendment to his grievance (i.e. 8 January 1982), Mr. Howard apparently had not seen the OPM determination or the transmittal thereof by the Chief, Staffing and Career Management Division, Directorate of Civilian Personnel, Office of the Deputy Chief of Staff for Personnel, Headquarters, Department of the Army (Exhibit H); thus, the grievance is based on Mr. Howard's understanding of the rather confusing state of affairs which existed prior to the OPM determination and concerns the actions of the Department of the Army Component Coordinator for the PPP. Essentially, the OPM determination renders moot Mr. Howard's argument that the Department of the Army acted improperly in removing him from Program R of the PPP, thereby terminating his consideration

for the Procurement Analyst, GS-1102-14, position at DARCOM.

C. In sum, the record reflects that a determination has already been made on the issue in the grievance by a higher-level authority outside the Department, i.e., the Office of Personnel Management. Subchapter 1-5b(1) of the superseded version of FPM Chapter 771 (portions of which remain in effect as they are a part of the Department's grievance system regulations) excludes from coverage under the agency grievance procedure matters which are subject to final administrative review outside the agency; a similar provision is found in 5 C.F.R. 771.205(c) (1) (ii) (FMP Chapter 771.2-7c(1) (b)).

III. CONCLUSION

As the issue in the grievance has been resolved through a determination by the Office of Personnel Management, it is excluded from coverage under the Department of the Army grievance system.

IV. DECISION

The grievance is rejected in accordance with, and under the authority of CPR Chapter 771.3-8b.

/s/
WILLIAM G. RIGHTOR
Investigator
USACARA-Columbia

APPROVED:

/s/
RALPH E. STEICK
Director
Greater Capital Region

APPENDIX F

FILED
December 10, 1987
George A. Fisher, Clerk
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH HOWARD, Appellant,	)	NO. 85-6096
vs.	)	Sept. Term 1987
CASPAR W. WEINBERGER, Secretary of Defense, et al.	)	CA No. 81-2398

BEFORE: EDWARDS, RUTH B. GINSBURG and BUCKLEY, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX G

FILED
December 10, 1987
George A. Fisher, Clerk
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH HOWARD, Appellant,	)NO. 85-6096)
vs.	)Sept. Term) 1987
CASPAR W. WEINBERGER, Secretary of Defense, et al.	)CA No.) 81-2398

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Appellant's suggestion for rehearing en banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*,

that the suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX H

3 June 1981
Mrs. Reid/wp/
52112

DAPE-CPS (11 May 81) 3rd Ind
SUBJECT: Priority Candidate -
Mr. Joseph F. Howard

HQDA (DAPE-CPS), WASH DC 20310

THRU: P&ES-W, Room 3D727, Pentagon
Washington, DC 20310

TO: US Army, Military District
of Washington, Fort Myer
Civilian Personnel Office,
Fort Myer, VA 22211

1. Basic letter disputed subject employee's qualifications for mandatory placement into the position of Procurement Analyst, GS-1102-14.

2. Mr. Howard was separated from the position of Attorney, GS-905-14, (an excepted service position) by RIF, and subsequently placed in a Procurement Analyst, GS-1102-11, position in the competitive service. Mr. Howard was registered in the Program R in the

competitive service for his retained grade, GS-14.

3. In accordance with Part I, Chapter 3, Paragraph V1, D, 9 of DoD 1400-20-1-M, Mr. Howard is not eligible to register in Program R for his retained grade in the excepted service. Furthermore, Mr. Howard may not be noncompetitively promoted to a grade level which he has not attained in the competitive service (FPM 335). Therefore, Mr. Howard is to be immediately removed from the Program R of the Priority Placement Program.

/s/
ARCHIE D. GRIMMETT
Component Coordinator

APPENDIX I

DEPARTMENT OF THE ARMY
OFFICE OF THE DEPUTY CHIEF
OF STAFF FOR PERSONNEL
WASHINGTON, DC 20310

DAPE-CPS 25 Sept. 1981

Mr. Gerald R. Sandaker
Acting Personnel Office
HQ US Army Military District,
Washington
Fort Lesley J. McNair
Washington, DC 20319

Dear Mr. Sandaker:

Attached is the input from this office in response to the Merit Systems Protection Board appeal of Mr. Joseph F. Howard.

As you will see, our statement represents a change of position from that stated in June 1981. If you have

any questions or wish to discuss this matter further, you may contact Mr. Kent Diamond at 697-0612.

/s/
JOANNA M. BRYAN
for ARCHIE D. GRIMMETT
Component Coordinator

(9) (a) Allegation of Illegal Deprivation of GS-14 Grade

HQDA letter dated 3 June 1981 (3rd Ind) directed that Mr. Howard be removed from the Program R of the DOD Priority Placement Program (PPP). This decision was based upon the DOD policy that Attorney positions would not be filled through the PPP. FPM 335 was also interpreted to preclude an employee from being non-competitively promoted to a grade level which he had not attained in the competitive service.

Upon thorough review of all pertinent regulations and consultation with DOD personnel, this office has concluded that Mr. Howard was entitled to register in the Program R (for non-attorney GS-14 level positions for which fully qualified only), and that we erred in directing his

removal. The Army Component Coordinator of the DOD PPP is directing that Mr. Howard be reregistered in the Program R for a period of time, that when added to the time he was in the program, totals 24 months.

(9)(c) See (9)(a) above.

(9)(k)(1) See (9)(a) above.

APPENDIX J

DEPARTMENT OF DEFENSE
Office of the Centralized
Referral Activity
1807 Wilmington Pike
Dayton, OH 45444

2 Nov 81

DoDCRA-R (Mr. Harris/(AV)850-5155/cc)

SUBJECT: Grade Retention Registration - Joseph F. Howard

TO: Civilian Personnel Officer
Department of the Army
Personnel and Employment
Service - Washington
Room 3D736, The Pentagon
Washington, DC 20310

1. The registration of Mr.Joseph F. Howard is returned without action. Based on the information contained in Item 1, Section B (element 44), Mr. Howard's retained grade eligibility began on 30 Sep 79. Under Section 5362, title 5, United States Code, eligibility continues for 2 years. His entitlement under the statutory authority expired on 30 Sep 81. The DoD Placement Plan for Employees Under

Grade Retention, Appendix B, DoD 1400.20-1-M, may not be used to extend the two year eligibility period.

2. It is assumed that DA is attempting to correct an administrative error. Such a correction does not extend the 2 year statutory period. DA administrative procedures must be employed to effect the desired action rather than the DoD Placement Plan.

/s/
WILLIAM T. HARRIS
Director, DoD Centralized
Referral Activity

APPENDIX K

United States of America
Office of Personnel Management
Washington, DC 20415

Nov. 5, 1981

Mr. Archie D. Grimmett, Chief
Staffing and Career Management Division
Office of the Deputy Chief of Staff
for Personnel
Department of the Army
Washington, DC 20310

Dear Mr. Grimmett:

This is in reply to your October 19 request for guidance on whether an employee in the competitive service can be noncompetitively promoted to a higher grade once held in the excepted service.

The case you described is as follows: In October 1979 a GS-14 attorney in the excepted service was reached for release in a reduction in force. In lieu of separation, he was offered and accepted a GS-11 position

in the competitive service. Since this action entitles employee to retained grade and pay benefits, your agency is obligated to make special efforts to place him in a GS-14 position. You suggest it may be appropriate to noncompetitively promote him from GS-11 to GS-14 in the competitive service.

FPM Letter 536-1 outlines the minimum requirements agencies must follow in placement programs for down-graded employees. Specifically, covered employees must be placed as expeditiously as possible in positions properly classified at the grade of the position held prior to the down-grading action. Therefore, the employee in question is entitled to placement consideration for a GS-14 position. Consideration must be

limited to the excepted service, however, since the employee has never held a GS-14 position in the competitive service.

The Civil Service Rules clearly distinguish between the competitive service and the excepted service. It is a longstanding policy that an appointment or grade level gained in the excepted service provides no similar entitlement in the competitive service. There is nothing in the law, regulations or FPM policy guidance on retained pay and grade to suggest that an exception to this policy is authorized.

While your agency's obligation is to try to place the employee in a GS-14 excepted position, you need not rule out placement actions in the competitive service. Since the employee formerly held a GS-12 competitive service position,

you may wish to consider placement at that level.

Under provisions of FPM Chapter 335 1-5 c(6) an employee can be non-competitively promoted to a grade or position from which he was demoted without personal cause and not at his or her request. If your agency's merit promotion plan contains this provision, you may noncompetitively promote this employee to the highest grade level he previously held in the competitive service, i.e., GS-12.

The substance of this letter has been discussed with Ms. Elizabeth Reid in your office.

Sincerely,

/s/
MORTON I. HORVITZ
Assistant Director of
Policy Analysis and
Development

APPENDIX L

Registration of Mr. Howard
in the R Program of the
Priority Placement Program
(PPP)

16 Nov 1981

DAPE-CPS Mrs. Reid/wp/52112

THRU HQ, MDW (OSJA)
Bld. 32, Ft. McNair
Washington, DC 20324

TO: HQ, MDW (ANCIV-MCL)
Ft. Myer CPO
Ft. Myer, VA 22211

1. Enclosed is the letter from the DOD Centralized Referral Activity which returned Mr. Howard's PPP registration. Since he is no longer in grade retention, it is not possible to register him in R Program.

2. Also inclosed is the Office of Personnel Management response to our inquiry regarding Mr. Howard's repromotion eligibility. As Mr. Howard has not attained the GS-14 level in the competitive service, he is not eligible for non-competitive promotion to the

GS-14 level in the competitive service. Mrs. Manov has advised that Mr. Howard has been receiving special consideration for repromotion to his highest attained grade in the competitive service, GS-12.

3. The OSD Civilian Personnel Policy Office has informally advised that attorneys are given special placement efforts required by CSRA within their own command. As Mr. Howard was the only attorney in ARI, he is in an unusual situation. Special placement efforts would only apply to any attorney position established at ARI.

FOR THE DEPUTY CHIEF OF STAFF FOR PERSONNEL:

/s/
ARCHIE D. GRIMMETT
Chief, Staffing and Career Management Division

APPENDIX M

Registration of Mr. Howard
in the Program R of the
Priority Placement Program

20 Nov. 1981
Mrs. Reid/ng/52112

PE-CPS

THRU HQ, MDW (ISJA)
Bld 32, Ft. McNair
Washington, DC 20324

TO HQ. MDW (ANCIV-MCL)
Ft. Myer CPO
Ft. Myer, VA 22211

1. Reference: DAPE-CPS DF of 16 November 1981, same subject.

2. The last sentence in the referenced letter should read: "Special placement efforts would only apply to any attorney positions within the MDW command."

FOR THE DEPUTY CHIEF OF STAFF FOR PERSONNEL:

/s/
ARCHIE D. GRIMMETT
Chief, Staffing and Career
Management Division

APPENDIX N

Pertinent provisions of the Age Discrimination in Employment Act applicable to Federal Government employment (Title 29 U.S. Code, Sections 631(b) and 663a) are as follows:

631. AGE LIMITS

(a) Intentionally omitted.

(b) EMPLOYEES OR APPLICANTS FOR EMPLOYMENT IN FEDERAL GOVERNMENT

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

633a. NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT EMPLOYMENT

(a) FEDERAL AGENCIES AFFECTED

All personnel actions affecting

employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments are defined in section 102 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Intentionally omitted.

(c) CIVIL ACTIONS; JURISDICTION; RELIEF

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Intentionally omitted.

(e) DUTY OF GOVERNMENT AGENCY OR OFFICIAL

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondicrimination on account of age in employment as required under any provision of Federal law.

(f) APPLICABILITY OF STATUTORY PROVISIONS TO PERSONNEL ACTION OF FEDERAL DEPARTMENT, ETC.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this

section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

APPENDIX O

With reference to the two year grade and pay retention provisions in Sections 5362 and 5363 for a federal government employee following a change to a lower graded position, Title 5 U.S. Code Section 5364 reads as follows:

5364. REMEDIAL ACTIONS

Under regulations prescribed by the Office of Personnel Management, the Office may require any agency -

(1) to report to the Office information with respect to vacancies (including impending vacancies);

(2) to take such steps as may be appropriate to assure employees receiving benefits under section 5362 or 5363 of this title have the opportunity to obtain necessary qualifications for the selection to positions which would minimize the need for the application of such sections;

(3) to establish a program under which employees receiving benefits under section 5362 or 5363 of this title are given priority in the consideration for or placement in positions which are equal to their retained grade or pay; and

(4) to place certain employees, notwithstanding the fact their previous position was in a different agency, but only in circumstances in which the Office determines the exercise of such authority is necessary to carry out the purpose of this section.